

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

LUIS CARLOS PILLADO

Claimant

V.

LUIS PILLADO

Respondent

AND

**FARM BUREAU PROPERTY & CASUALTY
INSURANCE COMPANY**

Insurance Carrier

Docket No. 1,068,336

ORDER

Claimant, through John O'Connor, requests review of Administrative Law Judge Kenneth J. Hursh's July 31, 2015 Award. Jon Newman appeared for respondent. Kip Kubin appeared for insurance carrier. The Board heard oral argument on December 8, 2015.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The judge concluded claimant's average weekly wage was \$444.85 and awarded him permanent partial disability benefits based on a 15% whole person functional impairment.

Claimant requests the Award be modified, arguing he has been permanently totally disabled subsequent to the end of 2013. Claimant also argues the judge should not have deducted some of his business expenses in calculating his average weekly wage. The insurance carrier maintains the Award should be affirmed.

The issues are:

1. What is claimant's average weekly wage?
2. Is claimant permanently and totally disabled on account of his work injury?¹

¹ No argument was raised regarding the judge's conclusion concerning claimant's functional impairment.

FINDINGS OF FACT

Claimant, 44 years old, is a naturalized American citizen originally from Mexico. Claimant installed carpet and vinyl flooring for 19 years, with the last eight or nine years exclusively for MC Flooring. Around 2012, MC Flooring advised claimant he would have to obtain his own workers compensation insurance coverage and list himself as his own employer. Despite this change, claimant continued working exclusively for MC Flooring.

According to the miscellaneous income reported by MC Flooring, claimant earned \$39,809.82 in 2012.² The claimant had \$20,854 in business expenses in 2012.³

On January 9, 2013, claimant struck his head on the edge of a cabinet while pulling up flooring. He experienced immediate pain and everything “kind of went black,” but he did not lose consciousness.⁴ Ten days later, claimant went to the University of Kansas Medical Center (KU) emergency room with complaints of sharp headaches, eye pain, blurring of his right eye, decreased taste, dizziness, slight difficulty with memory and sensitivity to noise and light. Claimant testified he began having memory problems a month or two after the accident. A CT scan and an MRI of claimant’s brain revealed no abnormalities. Following the accident, claimant continued to operate his flooring business, but testified he needed assistance from his two sons to locate places while driving and help with installation. He continued installing carpet and vinyl until December 2013.

According to claimant, in December 2013, he went to Mexico and left the task of renewing his workers compensation insurance coverage with one of his sons. Upon his return, he learned his insurance coverage had not been renewed. As a result, he was no longer able to perform work for MC Flooring. While he contacted a few other flooring installers about work, he was not offered employment. Claimant testified he was not hired because of his history of injury or resulting medical conditions. Claimant has not worked anywhere since the end of December 2013. He testified that he stopped running his business when his workers compensation insurance was canceled.

Dale Vestal, MC Flooring’s general manager, testified claimant performed work for MC Flooring as a subcontractor. Claimant would come in every morning and be given an assignment and materials for a job. According to Mr. Vestal, in December 2013, MC Flooring stopped giving claimant assignments because he “never showed back up”⁵ and would not return phone calls.

² R.H. Trans., Resp. Ex. A at 16.

³ *Id.*, Cl. Ex. 2 at 2 and Resp. Ex. A at 3.

⁴ P.H. Trans. at 11; R.H. Trans. at 31.

⁵ Vestal Depo. at 6.

Mr. Vestal was aware of claimant's accident in January 2013. He testified that between January and December 2013, claimant never reported any difficulty performing his work or driving to job sites. He does not recall claimant ever turning down an assignment or complaining of headaches, blurred vision, dizziness, sensitivity to noise/bright lights or memory problems. Mr. Vestal did not know if claimant's adult sons helped him with his work after the accident.

At the insurance carrier's request, James S. Appelbaum, M.D., a board certified neurologist, evaluated claimant on August 22, 2013. Dr. Appelbaum reviewed records, took a history and performed an examination. Dr. Appelbaum's examination was normal and he believed it was unusual for claimant's symptoms, such as headaches, to persist as long as they had. Dr. Appelbaum assessed claimant with a mild concussion. Dr. Appelbaum recommended a medication (escitalopram) and an MRI of claimant's brain.

Claimant returned to Dr. Appelbaum on October 3, 2013, reporting the prescribed medication made him dizzy and provided no relief. While Dr. Appelbaum initially thought claimant had symptoms of post-concussion syndrome, he withdrew that diagnosis when the MRI showed no abnormality. Testing done by Dr. Appelbaum was normal. Claimant's revised diagnosis was a possible concussion. Dr. Appelbaum expected claimant's symptoms to have resolved within six months because "there [were] no objective findings on the scans or the neurological examination or the other testing."⁶ Dr. Appelbaum testified it was possible to have microscopic brain damage from a concussion, despite a normal MRI study, but he had never seen such a case of a permanent medical problem when the patient did not have loss of consciousness.

Dr. Appelbaum recommended no additional treatment and released claimant at maximum medical improvement (MMI) with no permanent restrictions. The doctor noted claimant had neuropsychological testing possibly showing an executive function loss, but such possibility did not mean claimant needed restrictions or limitations. The term "executive function" was not defined in the record. Dr. Appelbaum opined claimant is capable of returning to his job as a carpet layer.

At claimant's attorney's request, P. Brent Koprivica, M.D., a board certified occupational medicine physician, evaluated claimant on May 6, 2014. Dr. Koprivica reviewed records, took a history and performed a physical examination. Claimant complained of constant headaches with his pain reaching as high as a 7 or 8 on a 0-10 pain scale and lasting as long as three days. He reported dizziness, blurred vision, memory loss, mood swings and diminished sense of taste. Dr. Koprivica diagnosed claimant with mild traumatic brain injury. He noted people with a normal CT scan can still have deficits. Dr. Koprivica stated that neuropsychological testing showed objective evidence that claimant had ongoing problems due to his head injury.

⁶ Appelbaum Depo. at 9, 16.

Using the *Guides*⁷ (hereafter *Guides*), Dr. Koprivica placed claimant in the moderate level of impairment (15% to 29%) and stated:

[E]ven though the clinical diagnosis is mild traumatic brain injury, the dysfunction in activities of daily living, including the inability to drive independently as well as the significant difficulties with social interaction with his family as well as co-workers and other individuals in the public, I would consider a twenty (20) percent whole person impairment to be appropriate.⁸

Dr. Koprivica did not provide claimant with work restrictions and did not opine claimant was permanently and totally disabled. The doctor did not testify regarding claimant's ability to work or comment on whether he had any task loss. He noted claimant continued to work until he lost his workers compensation insurance.

At the insurance carrier's request, Bernard M. Abrams, M.D., a board certified neurologist and a Clinical Professor of Neurology at the University of Missouri School of Medicine at Kansas City, evaluated claimant on July 23, 2014. Dr. Abrams reviewed medical records, took a history and performed a physical examination. Claimant complained of persistent right-sided headaches, dizziness, memory problems and diminished sense of taste. Physical examination was normal. Specific tests for dizziness revealed no abnormalities. Dr. Abrams indicated claimant had a concussion without loss of consciousness. The doctor acknowledged someone can have significant post-concussive syndrome with a normal MRI or CT scan.

Using the *Guides*, Dr. Abrams assigned claimant a 5% whole person functional impairment for his subjective complaints. He found no evidence claimant was malingering. When questioned regarding the permanency of claimant's condition, Dr. Abrams testified:

Well, I wouldn't expect it to be permanent, but, you know, workman's compensation is a little bit otherworldly in that - - in that at some point you are called upon to assign a permanent impairment rating for something that may or may not be permanent. If we were to go out, fast forward, let's say, five years, I think it's very unlikely that Mr. Pillado would continue to suffer from headaches, in which case at that point he would have a zero percent permanent partial impairment. But for the purposes of drawing a line in the sand, so to speak, at a given point, we give a number and it's quite - - you know, it really is - - not the number, the number is not artificial, but the period - - the point in time that we choose to give that number I think is - - is artificial and very arbitrary.⁹

⁷ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based on the fourth edition of the *Guides*.

⁸ Koprivica Depo., Ex. 2 at 17.

⁹ Abrams Depo. at 21.

Dr. Abrams' rating only accounted for claimant's headaches. Dr. Abrams believed claimant did not report memory problems until three months post-accident. On such basis, Dr. Abrams stated it would be impossible to link claimant's asserted memory issues to his injury. However, Dr. Abrams was shown a medical record stating claimant complained of memory loss three weeks after his accident, which Dr. Abrams stated was still a "long time."¹⁰

While claimant complained of depression, Dr. Abrams indicated the cause was unclear, although potential causes could be claimant's injury or loss of employment. Dr. Abrams indicated claimant told him he could work and the doctor opined claimant could work if he had valid workers compensation insurance.

At claimant's attorney's request, claimant was interviewed by Michael Dreiling, a vocational consultant, on February 2, 2015. Mr. Dreiling gave claimant a Wonderlick Personnel Test in English.¹¹ Claimant testified he feels most comfortable using an interpreter to communicate in his native Spanish. Based on the test, Mr. Dreiling indicated claimant presented as someone in the bottom 5% of the population for general cognitive skills, was better at Spanish than English, had a history consistent with manual labor and best suited to on-the-job training instead of training in an academic setting.

Mr. Dreiling noted that claimant had looked for work. Mr. Dreiling opined claimant is realistically and practically unemployable in the open labor market based upon claimant's limited English skills, the described symptoms, claimant being unable to provide workers compensation insurance, claimant being unable to find other employment, and claimant not receiving help with job search skills. If the finder of fact found claimant was not permanently and totally disabled, Mr. Dreiling indicated claimant could earn \$348 to \$414 per week.

On cross-examination, Mr. Dreiling acknowledged he found no specific work restrictions placed on claimant by doctors and the primary reason claimant stopped working was that he was unable to procure workers compensation insurance coverage.¹²

At the insurance carrier's attorney's request, claimant was interviewed by Terry Cordray, a vocational counselor, on April 13, 2015. It was Mr. Cordray's opinion claimant retains the functional capacity, education and skill level to return to work in floor laying and earning \$16.41 per hour. Mr. Cordray noted claimant worked until he did not have workers compensation insurance.

¹⁰ *Id.* at 31.

¹¹ Mr. Dreiling has a Bachelors of Science for psychology and a Masters of Science for guidance and counseling. He is not a psychologist.

¹² Dreiling Depo. at 23-24, Ex. 2 at 9.

Claimant testified his two appointments with Dr. Appelbaum took no more than five minutes each. Claimant testified he continues to experience headaches, dizziness, memory loss, mood swings (aggressiveness), depression, anxiety, suicidal ideation and diminished sense of taste. He does not take prescription medication, but uses Tylenol. Claimant testified his current symptoms preclude his ability to work and he is not able to drive himself to work sites. His sons did most of the driving. He sometimes drove to job sites, but with the help of his adult sons. Claimant testified he is worried he will cause a motor vehicle accident. He indicated he takes much longer to perform work tasks. For instance, a job that used to take two or three hours now takes six or seven hours.

In the July 31, 2015 Award, the judge stated:

Average weekly wage. The claimant was a self-employed flooring installer. His only client was MC Flooring. In the 26 weeks preceding the accident, which occurred January 9, 2013, the claimant worked 13 weeks and was paid a total of \$12,039.22 by MC Flooring. This figure was 30% of the total \$39,809.89 the claimant was paid by MC Flooring in 2012. The claimant also had business expenses, which for 2012 totaled \$20,854.00. The claimant's actual remuneration from his business would therefore be his earnings minus his business expenses.

Since the claimant earned 30% of his yearly earnings in the 26 weeks preceding the accident, he most likely incurred 30% of his business expenses in that time period as well. Thirty per cent of \$20,854.00 is \$6256.20. Subtracting that figure from \$12,029.22 leaves total remuneration of \$5,783.02 for the 13 weeks the claimant worked during the 26 week period. Dividing \$5,783.02 by 13 produces an average weekly wage of \$444.85 with a resulting compensation rate of \$296.58.

...

Nature and extent of permanent disability. On January 9, 2013 the claimant struck the right side of his head on a cabinet while removing a piece of flooring. He did not lose consciousness. He did not seek medical attention until ten days later when he went to the emergency room at KU Hospital because he experienced headache, watering in his right eye, and diminished sense of taste. He said as time went on he began to notice problems with memory, dizziness, and mood, as well. The claimant continued to operate his flooring business, though he said he needed help from his two sons to locate places while driving and with the actual install work. The claimant received counseling and speech and memory therapy at KU. A CT scan and MRI of the claimant's brain revealed no abnormalities.

The claimant stopped working at the end of 2013. His workers compensation insurance was not renewed after 2013, and without workers compensation insurance, he could not receive work from MC Flooring. The claimant said he contacted a few other flooring installers about work, but has been offered no other employment. He said he still experiences the symptoms of headache, dizziness, memory loss, mood swings, and diminished sense of taste.

. . .

The preponderance of the evidence failed to show the claimant is incapable of working. The claimant's unemployment is due to his insurance situation rather than the effects of the injury. Permanent total disability shall not be awarded.

Head injuries do not appear on the K.S.A. 44-510d schedule of injuries, so permanent partial disability shall be determined according to K.S.A. 44-510e. That section provides for general "work" disability in excess of functional impairment if the employee has a functional impairment of at least 7.5% and sustained a post injury wage loss of at least 10% directly attributable to the work injury.

Turning first to functional impairment, Dr. Koprivica's rating standard was based on the *Guides*, 4th Edition as required by K.S.A. 44-510e, provided an actual range of percentages, and specifically addressed the part of the body injured and the reported symptoms. Dr. Abrams' rating did not use a standard addressing the particular part of the body injured and was admittedly a vague standard. The court found Dr. Koprivica's rating method more credible. However, Dr. Koprivica based his final conclusion on the symptoms as described by the claimant. Clinical tests performed by Dr. Abrams and Dr. Applebaum [sic] indicated the claimant's symptoms were not as severe as the claimant described. Therefore, the bottom of the 15% to 29% range of impairment identified by Dr. Koprivica seems most appropriate. It is held the claimant's permanent functional impairment from the injury is 15% to the body as a whole.

The claimant's functional impairment is above the threshold for work disability. The next question is whether the claimant sustained a post injury wage loss of at least 10% attributable to the injury. The court's analysis on this issue is the same as for permanent total disability. The claimant's unemployment and resulting wage loss is due to his insurance situation rather than the effects of the injury. Any wage loss the claimant is experiencing is not attributable to the injury.

Furthermore, K.S.A. 44-510e(a)(2)(E) says the administrative law judge shall impute an appropriate post-injury average weekly wage reflecting the average weekly wage the employee is capable of earning after the injury. The record showed the claimant is capable of continuing work as a self-employed flooring installer. He is capable of earning the same wage he was earning at the time of the injury. Therefore, the claimant suffered no wage loss.

Because the claimant did not sustain a wage loss of at least 10% attributable to the injury, work disability shall not be awarded. The claimant's permanent partial disability shall be limited to functional impairment.

Thereafter, claimant filed an appeal.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment.¹³ The burden of proof is on the claimant. To determine if claimant satisfied his or her burden of proof, the trier of fact shall consider the whole record.¹⁴

K.S.A. 2012 Supp. 44-510c(a)(2) states, “Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Expert evidence shall be required to prove permanent total disability.”

An employee is permanently and totally disabled when the employee is “essentially and realistically unemployable.”¹⁵

K.S.A. 2012 Supp. 44-511(b)(1) states, “Unless otherwise provided, the employee's average weekly wage for the purpose of computing any compensation benefits provided by the workers compensation act shall be the wages the employee earned during the calendar weeks employed by the employer, up to 26 calendar weeks immediately preceding the date of the injury, divided by the number of calendar weeks the employee actually worked, or by 26 as the case may be.”

For a self-employed individual, computing average weekly wage can be done by deducting business expenses from earnings and dividing the result by the relevant number of weeks.¹⁶

ANALYSIS

Claimant is not permanently and totally disabled. Claimant is capable of substantial and gainful employment in the open labor market. He worked for nearly a year post-injury and looked for work subsequent to his workers compensation insurance being canceled. The reason he is not working is largely because his workers compensation insurance was canceled. No doctor provided permanent work restrictions or indicated claimant had any task loss, let alone that he was permanently and totally disabled.

¹³ K.S.A. 2012 Supp. 44-501b(b).

¹⁴ K.S.A. 2012 Supp. 44-501b(c).

¹⁵ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

¹⁶ *Hinrichs v. Martin G. Hinrichs*, No. 159,865, 1996 WL 580382 (Kan. WCAB Sept. 24, 1996). See also *Smith v. Smith and Smith*, No. 227,363, 1999 WL 1113654 (Kan. WCAB Nov. 30, 1999) (average weekly wage based on profit divided by applicable weeks).

The Board agrees with the judge's computation of claimant's average weekly wage. The parties, in their briefs, seem to agree claimant's average weekly wage should be based on his gross earnings less his business expenses, divided by up to 26 weeks worked or as the case may be. However, claimant argues only his necessary expenses should be deducted in the calculation. We find claimant's claimed expenses for tax purposes are also his expenses when it comes to determining his average weekly wage. We know of no support for claimant's argument.

CONCLUSIONS

Claimant is not permanently and totally disabled. His average weekly wage was \$444.85.

AWARD

WHEREFORE, the Board affirms the July 31, 2015 Award.

IT IS SO ORDERED.

Dated this _____ day of December, 2015.

BOARD MEMBER

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Honorable Kenneth J. Hursh